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June 15, 2012

The Honorable Jocelyn Boyd
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, LLC d/b/a AT&T South Carolina, Complainant/Petitioner v. Halo Wireless, Inc., Defendant/Respondent
Docket No.: 2011-304-C

Dear Ms. Boyd:

Enclosed for filing is AT&T South Carolina's Proposed Order in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this pleading as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
1037572

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re: Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc. for Breach of the Parties' Interconnection Agreement	)	**Docket No. 2011-304-C**

AT&T SOUTH CAROLINA'S PROPOSED ORDER

On July 29, 2011, AT&T South Carolina (or "AT&T") filed a Complaint against Halo Wireless, Inc. ("Halo"), alleging various breaches of the parties' interconnection agreement ("ICA"). AT&T South Carolina alleges that Halo has breached the parties' ICA by (1) sending non-wireless-originated traffic to AT&T South Carolina; (2) sending inaccurate call information to AT&T South Carolina; and (3) failing to pay for various interconnection facilities. AT&T South Carolina seeks various remedies for these alleged breaches, as discussed below.

Halo answered the Complaint on January 20, 2012 (after Halo removed the case to federal district court and the court then remanded the proceeding here). Also on January 20, 2012, Halo filed a Partial Motion to Dismiss Counts I, II, and III of AT&T's Complaint. That Motion was denied on February 15, 2012. On February 27, 2012, Halo requested an abatement of the proceeding, and the Hearing Officer denied that request on March 1, 2012.

On April 18, 2012, the Commission held an evidentiary hearing on AT&T South Carolina's Complaint. AT&T South Carolina was represented by Patrick W. Turner, Esq., and J. Tyson Covey, Esq. Halo was represented by W. Scott McCollough, Esq., Jennifer M. Larson, Esq., and John J. Pringle, Jr., Esq. The Office of Regulatory Staff ("ORS") was represented by Nanette S. Edwards, Esq. The South Carolina Telephone Coalition ("SCTC") was represented by

M. John Bowen, Jr., Esq. and Margaret M. Fox, Esq. AT&T South Carolina presented the testimony of J. Scott McPhee, Mark Neinast, and Raymond Drause. Halo moved to strike the AT&T South Carolina testimony on April 6, 2012, but the Hearing Officer denied that motion on April 11, 2012. Halo presented the testimony of Russell Wiseman and Robert Johnson. The ORS presented the testimony of Christopher Rozycki. The SCTC did not present a witness.

On June 15, 2012, the parties submitted post-hearing Briefs and Proposed Orders. We have carefully reviewed these submissions, the evidence of record, and the controlling law, and this Order sets forth our rulings.

I. FINDINGS OF FACT

1. Halo purports to be a wireless carrier. Tr. 354 (Wiseman Rebuttal).

2. Halo entered into a wireless ICA with AT&T South Carolina which provides, in pertinent part:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to [Halo]'s wireless network for wireless termination by [Halo]; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network. [Emphasis added].

Hearing Ex. 1 (Ex. JSM-5); Tr. 42 (McPhee Direct at 12).

3. Consistent with the provision quoted above, all of the trunks that Halo ordered to deliver traffic to AT&T South Carolina were trunks reserved for wireless traffic only. Tr. 175-76 (Neinast Direct at 9-10).

4. Halo has been sending traffic to AT&T South Carolina that starts on landline networks, and therefore does not start on wireless equipment. Hearing Ex. 1 (Ex. JSM-1 at 5-6); Tr. 326 (Wiseman Rebuttal at 19); Tr. 401-02 (Wiseman Cross-Examination); Tr. 512 (Rozycki Direct at 7). *See also* Tr. at 182 & Hearing Ex. 4 (Ex. MN-3). (AT&T South Carolina's analysis

of the calls Halo sent to it during one-week periods in April 2011 and September 2011 showed that 64% to 67% of the calls that Halo delivered to AT&T originated as landline calls).

5. Halo sends long distance traffic to "downstream carriers" such as the rural LECs that are members of the SCTC, via an AT&T tandem switch. (McPhee rebuttal at 13.) AT&T terminates approximately 52% of the traffic it receives from Halo, and delivers approximately 48% to other carriers for termination. (Exhibit MCN-3.) The vast majority (84%) of the traffic delivered to other carriers is destined for the rural LECs like the SCTC's members. (McPhee rebuttal at 14.)

6. Halo and Transcom Enhanced Services, Inc. (Transcom") both have equipment at a tower site in Orangeburg, South Carolina. Tr. 259 (Drause Rebuttal at 4).

7. Every call that comes to Halo in South Carolina first passes from the carrier whose end user customer originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (in Dallas, New York, Atlanta, and Los Angeles.). *See* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6)Tr. 38 (McPhee Direct at 8).

8. Transcom then sends the call to its equipment at the Orangeburg tower site, *see* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6), where Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment. Tr. 262 (Drause Rebuttal at 7).

9. Halo then sends the call on to AT&T South Carolina's tandem switch for termination to an AT&T South Carolina end-user or to be passed on to a third-party carrier for termination. Tr. 260-61 (Drause Rebuttal at 5-6).

10. There is no relationship between Transcom and any of the calling parties that made these calls. Tr. 407-08 (ORS's cross-examination of Wiseman); Tr. 442 (Johnson Rebuttal at 10).

11. The ICA requires call information like Calling Party Number ("CPN") and Charge Number ("CN") to be accurate so the parties can accurately bill one another. Tr. 52-53 (McPhee Direct at 22-23) & Hearing Ex. 1 (Ex. JSM-4 at § XIV.G).

12. Until the end of 2011, Halo inserted a CN assigned to Transcom into the call record on every call it sent to AT&T. Tr. 338 (Wiseman Rebuttal at 31); Tr. 407 (Wiseman); Tr. 200 (Neinast Direct at 34).

13. In every case, the CN Halo inserted was local to (*i.e.*, in the same MTA as) the number the call was being terminated to. Tr. 200 (Neinast Direct at 34).

14. Section V.B of the ICA provides:

> [AT&T] and [Halo] will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended from time to time. [AT&T] will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of [AT&T] originated Local traffic to [Halo]'s POI within [AT&T]'s service territory and within the LATA (calculated based on the number of minutes of traffic identified as [AT&T]'s divided by the total minutes of use on the facility), and [Halo] will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic.

Hearing Ex. 1 (Ex. JSM-4).

15. Section VI.B.2.b of the ICA provides:

> [AT&T] will bill [Halo] for the entire cost of the facility. [Halo] will then apply the [AT&T] originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by [AT&T] to [Halo]. [Halo] will invoice [AT&T] on a

> monthly basis, this proportionate cost for the facilities utilized by [AT&T].

Id.

16. The apportioning of facilities costs applies for the entire facility between AT&T's switch and Halo's switch. Tr. 56 (McPhee Direct at 26).

17. In order to interconnect with AT&T, Halo has ordered and obtained various interconnection facilities from AT&T. Tr. 55 (McPhee Direct at 25).

18. AT&T has billed Halo for those facilities, but Halo has disputed those charges and refused to pay them. Tr. at 54 (McPhee Direct at 24).

19. As of the end of 2011, more than $172,000 in charges for these facilities remained disputed and unpaid. Tr. at 55 (McPhee Direct at 25).

II. CONCLUSIONS OF LAW

1. Transcom is not an Enhanced Service Provider.

2. Transcom does not originate any traffic that it sends to Halo in South Carolina.

3. Halo has materially breached the ICA by: (1) sending landline-originated traffic to AT&T, (2) inserting incorrect CN information on calls; and (3) failing to pay for facilities it has ordered pursuant to the ICA.

4. As a result of these material breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo.

5. Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T (though we do not quantify any precise amount due, assuming that is an issue for Halo's bankruptcy proceeding).

6. Halo is liable to AT&T for interconnection facilities charges that it has refused to pay to AT&T (though we do not quantify any precise amount due, assuming that is an issue for Halo's bankruptcy proceeding).

III. DISCUSSION

A. HALO'S TRAFFIC

Halo purports to be a wireless carrier. Halo therefore entered into a wireless ICA with AT&T South Carolina. Tr. 42 (McPhee Direct at 12). The only traffic that the ICA allows Halo to send to AT&T is traffic that originates on wireless equipment. In an amendment entered at the same time as the agreement itself, the ICA states as follows:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on [AT&T's] network or is transited through [AT&T's] network and is routed to [Halo]'s wireless network for wireless termination by [Halo]; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to [AT&T]*** for termination by [AT&T] or for transit to another network. [Emphasis added].

Hearing Ex. 1 (Ex. JSM-5).

Consistent with the provision quoted above, all of the trunks that Halo ordered to deliver traffic to AT&T were trunks reserved for wireless traffic only. Tr. 175-76 (Neinast Direct at 9-10). The evidence, however, is undisputed that Halo has been sending traffic to AT&T South Carolina that starts on landline networks, and therefore does not start on wireless facilities. Halo admits this. Tr. 326 (Wiseman Rebuttal at 19) ("Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."); Tr. 401-02 (Wiseman Cross-Examination); Hearing Ex. 1 (Ex. JSM-1 at 5-6). The Office of Regulatory Staff ("ORS") recognized this as well. Tr. 512. (Rozycki Direct at 7) ("Much of the traffic Halo transports originated as wireline telephone calls.").

In addition, AT&T South Carolina analyzed the calls Halo sent to it during one-week periods in April 2011 and September 2011. Tr. 179 (Neinast Direct at 13). AT&T began its analysis by identifying the CPN on each call received from Halo, *i.e.*, the telephone number of the person who started the call. AT&T then consulted the industry's Local Exchange Routing Guide ("LERG") and the North American Number Portability ("NANP") database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless. *Id.* at 179-82. Based on this, AT&T was able to determine how many landline-originated calls Halo was sending. *Id.* During the periods reviewed, the call data showed that 64% to 67% of the calls that Halo delivered to AT&T originated as landline calls. *Id.* at 182 & Hearing Ex. 4 (Ex. MN-3). In other words, even though the ICA did not allow Halo to send AT&T any landline-originated traffic, the evidence shows that about two-thirds of the traffic Halo sent to AT&T was landline-originated, and that breaches the ICA.[1]

Halo challenges AT&T's position in two ways. First, Halo contends that AT&T South Carolina's call analyses cannot be used, because it is not certain that every call that AT&T South Carolina treats as originating on a landline network necessarily did originate on a landline network. Specifically, Halo contends that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. The scenario Halo relies on is a number that the LERG shows as being owned by Level 3 or Bandwidth.com, which identify themselves as landline carriers in the LERG, but that Level 3 or Bandwidth.com has assigned to Google or Skype, which have services that can be used by

[1] "Downstream carriers" such as the SCTC's members are impacted as well. Halo sends long distance traffic to those carriers via an AT&T tandem switch. (McPhee rebuttal at 13.) In fact, AT&T terminates approximately 52% of the traffic it receives from Halo, and delivers approximately 48% to other carriers for termination. (Exhibit MCN-3.) The vast majority (84%) of the traffic delivered to other carriers is destined for the rural LECs like the SCTC's members. (McPhee rebuttal at 14).

customers on wireless devices. Tr. 333-35 (Wiseman Rebuttal at 26-28). Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on any of the calls Halo sends AT&T. *Id.*

We reject Halo's argument. To begin with, the ICA does not allow Halo to send any landline-originated calls to AT&T South Carolina. Even one such call would be a breach. Yet Halo does not deny that it sends at least some landline-originated calls to AT&T South Carolina (except under its other argument, which we discuss below). In addition, the data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine. *Id.* There is no better way, and Halo does not suggest that there is. *See* Order, *In re: BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 , at 17 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*"), Hearing Ex. 1 (Ex. JSM-8). AT&T South Carolina also proved that Halo's contentions about Level 3 and Bandwidth.com numbers would make no meaningful difference even if they were correct. AT&T South Carolina assumed for the sake of argument that 100% of calls from Level 3 and Bandwidth.com numbers were actually wireless-originated and re-analyzed the call data based on that assumption. Even with this assumption, however, the data still showed that 57% to 59% of the traffic that Halo sent to AT&T was landline-originated. *Id.* at 185-86 & Hearing Ex. 4 (Ex. MN-5).

Halo's second argument, and the one on which it relies the most, is that every call it sends to AT&T South Carolina, regardless of where the call actually starts, should be deemed to be originate as a wireless (and local) call by Transcom at the tower in Orangeburg, South Carolina where Trasncom hands traffic to Halo. Specifically, Halo contends that whenever a call passes through Transcom, that call is terminated and Transcom then originates a new, local,

wireless call before the call reaches Halo. Tr. 329-32 (Wiseman Rebuttal at 22-25); Hearing Ex. 1 (Ex. JSM-1 at 5-9). To understand this theory, it helps to back up for a moment and explain what Transcom is and its arrangement with Halo.

Halo and Transcom both have equipment at a tower site in Orangeburg, South Carolina, and the arrangement between them works as follows. Every call that comes to Halo in South Carolina first passes through Transcom's equipment at the Orangeburg tower site. *See* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6). Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment. Tr. 262 (Drause Rebuttal at 7). Halo then sends the call on to AT&T South Carolina's tandem switch for termination to an AT&T South Carolina end-user or to be passed on to a third-party carrier for termination. Tr. 260-61 (Drause Rebuttal at 5-6).

To envision how a call flows through this arrangement, assume a call begins with a girl picking up her landline phone in California and dialing her grandmother in Columbia, South Carolina. *See* Tr. 189 (Neinast Direct at 23) & Hearing Ex. 4 (Ex. MN-6). That landline call would travel across the country, eventually hit Transcom's equipment at the Orangeburg tower, travel wirelessly to Halo for 150 feet and then be handed off to AT&T, which would terminate the call in Columbia on its landline network and thus enable the girl and grandmother to talk to each other. *Id.*

According to AT&T South Carolina, that call originated with the girl in California, who is the calling party, and is a non-local, landline-originated call, subject to landline access charges. According to Halo, however, when the girl's call reaches Transcom's equipment in Orangeburg, Transcom terminates the call and then originates a new call to the grandmother that is both local and wireless, and, therefore, is only subject to reciprocal compensation charges. *Id.*; Tr. 315

(Wiseman Rebuttal at 8). Halo makes this argument even though it is undisputed that the calling party (the girl who started the call) has no relationship with Transcom, did not dial Transcom's number, has no idea Transcom is even involved with the call, and ends up talking to the person she dialed in the first place (her grandmother) without dialing any extra numbers or codes. Tr. 194 (Neinast Direct at 28); Tr. 407-08 (ORS cross-examination of Wiseman); Tr. 442 (Johnson Rebuttal at 10).

The logic of Halo's "Transcom origination" theory runs as follows:

1. Transcom is an enhanced service provider ("ESP") under federal law.
2. As an ESP, Transcom is treated like an end-user for purposes of access charges.
3. Therefore, Transcom must be treated as an end user for all purposes.
4. Since Transcom is treated as an end user, all calls must be deemed to terminate to Transcom and originate with Transcom.
5. Therefore, a call from California to Columbia that is routed in the manner discussed above terminates with Transcom, which then originates a new, wireless call, which passes through Halo and then to AT&T in the same MTA as Transcom.
6. Thus, the call that AT&T receives from Halo originated wirelessly, with Transcom, and Halo is not breaching its ICA.

We find that Halo's theory fails for at least four reasons: (1) the FCC (and TRA) have rejected it; (2) there is no authority for the proposition that ESPs originate every call they touch; (3) Transcom is not an ESP in any event; (4) even if Transcom did originate every call, they would still be landline originated calls (in breach of the ICA) and non-local calls that are subject to access charges (which Halso has yet to pay).

In its recent *Connect America Order*,[2] the FCC singled out Halo by name, described Halo's arrangement of having traffic pass through an alleged ESP (*i.e.*, Transcom) before

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[2] *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

reaching Halo,[3] noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory. The FCC's discussion at paragraphs 1003-06 is worth quoting in full:

> 1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia,* on the proper interpretation of this rule.
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> 1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.
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> 1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA."[4] It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect

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[3] The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. *See Connect America Order*, nn. 2120-2122, 2128; Tr. 49-50 (McPhee Direct at 19-20) & Hearing Ex. 1 (Exs. JSM-6 and JSM-7).

[4] The FCC cited two Halo *ex parte* filings for this description. *Connect America Order*, nn. 2120-22. Those make plain that the alleged ESP is Transcom. *See* Tr. 49-50 (McPhee Direct at 19-20) & Hearing Ex. 1 (Exs. JSM-6 and JSM-7).

> wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."
>
> 1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider***. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.*** [Emphasis added, footnotes omitted].

The FCC rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network are somehow "re-originated" and transformed into wireless calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory. Tr. 314, 318-19, 324, and 330-31 (Wiseman Rebuttal at 7 n.1, 11-12, 17 n.11, and 23-24). The FCC said that a call is originated wirelessly only if the "calling party" – the person dialing the phone number – initiated the call through a wireless carrier. The majority of the calls Halo has been sending to AT&T South Carolina did not originate that way, as AT&T's call studies show.

Agreeing with the FCC, the Tennessee Regulatory Authority also rejected Halo's "Transcom origination" theory in a recent decision in favor of AT&T Tennessee on the identical issue. *Tennessee Halo Order* at 15-17. Among other things, the TRA found, based on Halo's *ex*

parte filings in the *Connect America* case, that the FCC was aware of Halo's theory that Transcom originates (or re-originates) every call it touches, and has rejected that theory. *Id.* The TRA's decision sustaining AT&T Tennessee's claims is thorough and well-reasoned.

We further note that Halo's own testimony undermines its "Transcom origination" theory. On questioning by Commissioner Mitchell, Halo witness Mr. Wiseman acknowledged that Halo's theory is inconsistent with long-standing practice in the industry and common sense. Specifically, Commissioner Mitchell asked Mr. Wiseman about a call from one landline customer to another landline customer that is routed, in part, by a micro-radio transmission somewhere in the middle. Tr. 416. Mr. Wiseman testified "[t]he microwave [*i.e.*, wireless] link in that call would not make that call a wireless call." Tr. 417. Similarly, Halo's injection of a 150-foot wireless transmission in the middle of a call from a landline customer in California to a landline customer in Columbia does not make that call a wireless call.

Moreover, even if Transcom were an ESP, Halo has cited no authority supporting its claim that ESPs terminate every call they touch and then originate a new call. That is not surprising, for the argument defies common sense. If the girl in California picks up her landline phone, dials her grandmother in South Carolina, and they have a conversation, that is one call, not two calls. No new, separate call exists simply because the girl's call passed through Transcom's equipment somewhere along the way. Tr. 58 (Neinast Direct at 28); Tr. 442 (Johnson Rebuttal at 10). As Transcom witness Mr. Johnson stated, "a call has only one point of origination, which is the point at which the call originated. You can't change the call's point of origination." Tr. 472 (Johnson Rebuttal at 40). The only call in the scenario discussed above is the call from the girl in California to her grandmother in South Carolina – after all, the girl did not call Transcom. The "point at which th[at] call originated" is California, and California is

therefore the "only . . . point of origination." *Accord*, Tr. 514 (Rozycki Direct at 9) ("Many of Transcom's so-called wireless/ESP transmissions first originated as traditional telephone calls and were directed to one and only one terminating telephone number. When the receiving party answered, one individual spoke with another individual, a voice communication occurred.").

Halo's theory rests on the idea that ESPs are deemed to be end-users, and therefore (according to Halo) Transcom must be deemed to originate every call that passes through their equipment. Tr. 329-32 (Wiseman Rebuttal at 22-25). But again Halo cited no authority that actually supports its position. To the contrary, the FCC has made clear that ESPs "are treated as end-users *for the purpose of applying access charges*"[5] only and "are treated as end users *for purposes of our access charge rules.*"[6] Thus, the "ESP exemption" is a legal fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges.* That does not mean an ESP could use this limited "end-user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide or alter the voice content that the parties exchange on the call (the calling and called parties do). Moreover, the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom would not apply to Halo anyway.[7]

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 11 (2001) ("*ISP Remand Order*") (emphasis added, subsequent history omitted).

[6] *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987) ("*Northwestern Bell Order*"). Five years after it was issued, this decision was vacated as moot. 7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC's explanation of the ESP exemption.

[7] *Northwestern Bell Order*, 2 FCC Rcd. 5986, ¶ 21 (1987); *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm'n Feb. 11, 2009) (the ESP exemption "exempts ESPs, and *only* ESPs, from certain access charges" and does not apply to carriers that transport calls for ESPs); *Pacific Bell Tel. Co. v. Global NAPs Cal., Inc.*, D.09-01-038, Order Denying Rehearing of D.08-09-027, at 11, 2009 WL 254838, at *5

The FCC has never held that an ESP "originates" calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.[8] To the contrary, the FCC rejected Halo's theory that Transcom originates calls in the *Connect America Order* (¶¶ 1005-06). The FCC also rejected a similar two-call theory several years earlier. In that case, legacy AT&T (pre-BellSouth merger AT&T) provided a calling card service where, during call set-up, the calling party heard an advertisement from the retailer that sold the card. *AT&T Calling Card Order*, 20 FCC Rcd. 4826, ¶ 6.[9] Legacy AT&T argued that this was an enhanced service and that the "first stage of the call," where the caller heard the advertisement, was "separate from the communication between the calling party and the called party," and therefore "created an endpoint" that "divided [the] calling card communication into two calls." *Id.*, ¶¶ 8, 23. The FCC rejected that view, finding that the communication with the alleged enhanced service platform (the advertising message) did not "create an endpoint" and that communication of the advertising message was merely "incidental" to the single call the end user made. *Id.*, ¶ 23. Here, of course, there is no communication at all between Transcom and the calling or called party (*see* Tr. 442 (Johnson Rebuttal at 10)), so there is even less basis for claiming that Transcom creates an

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(Cal. P.U.C. Jan. 29, 2009) ("the [ESP] exemption applies only to the ESP itself, not to the carrier of ESP traffic"); *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas*, Order No. 16, Dkt., Nos. 06-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 868 *26-27 (Kan. Corp. Comm'n 2005) ("that [ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs and other customers"). Thus, regardless of Transcom's alleged status, there is no basis for *Halo* to claim it is exempt from access charges on the toll traffic it has been sending to AT&T.

[8] Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. Tr. 329-32 (Wiseman Rebuttal at 22-25). But Halo does not cite a single FCC decision, or any decision by any other entity, that actually holds this. Halo also tries to compare Transcom to an entity using a "Leaky PBX," as if it that legitimizes Halo's conduct. *Id.* at 314-15. That alleged comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction. *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). *See also* Tr. 190-91 (Neinast Direct at 24-25). Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

[9] Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005) ("*AT&T Calling Card Order*"), *aff'd, AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006)

endpoint or originates a new call. Indeed, AT&T witness Mr. Drause explained that Transcom's equipment is not even *capable* of originating a call, for it does nothing more than convert IP data into a radio signal. Tr. 263 (Drause Rebuttal at 8). The ORS agrees that Transcom does not originate calls. Tr. 510 (Rozycki Direct at 5) ("Transcom cannot be classified as an originating or terminating end user").

Halo also tries to support its "Transcom origination" theory by citing *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), claiming that the court there functionally held that every ESP is an "origination" "endpoint" on every call. Tr. 314-15, 330-31 (Wiseman Rebuttal at 7-8, 23-24). But the decision does not support Halo, and in any event has no bearing here. The FCC obviously was well aware of the D.C. Circuit's *Bell Atlantic* decision when it issued the *Connect America Order*, but still rejected Halo's theory that all calls originate with Transcom. *Connect America Order*, ¶¶ 1005-06.[10] The court in *Bell Atlantic* also was not dealing with ESPs in general, but rather was dealing with Internet Service Providers in particular, so its discussion cannot be generalized to all alleged ESPs. Transcom is not an Internet Service Provider. Moreover, contrary to Halo's claim, the D.C. Circuit did not actually hold that Internet Service Providers are an origination "endpoint." Rather, it merely remanded to the FCC to consider that alternative as a possible way to look at what those providers do, and on remand the FCC took a different path, so it never had to address the issue.

In addition, Halo's assumption that the D.C. Circuit's discussion of Internet Service Providers in *Bell Atlantic* applies to every ESP is misplaced. For example, in the *AT&T Calling Card Order* the FCC rejected an attempt to compare the "enhanced" calling card service with calls to Internet Service Providers ("ISP-bound calls"). The FCC found that the services were

[10] The FCC also was well aware of the *Bell Atlantic* decision when it issued the *AT&T Calling Card Order*, which rejected the similar argument that an alleged ESP must be deemed to be an origination "endpoint" on calls initiated by others. *AT&T Calling Card Order*, ¶¶ 8, 23.

not analogous, because while calls to ISPs "may consist of multiple communications," a call from a calling card user is different, because "the only relevant communication" in that situation "is from the calling card caller to the called party." *AT&T Calling Card Order*, ¶¶ 25-26. The same analysis applies here, where "the only relevant communication" is between the calling party and the called party.

Halo's testimony also discusses, at some length, certain decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago. Halo relies on these rulings for the proposition that Transcom is an ESP under federal law. Tr. 321-24 (Wiseman Rebuttal at 14-17). Those decisions are irrelevant here. Only one of these decisions both involved an AT&T entity and actually held (incorrectly) that Transcom is an ESP. *See* Hearing Ex. 7 (Johnson Rebuttal, Ex. 1). That decision, however, was vacated on appeal and carries no precedential or preclusive effect here. *See id.* at 1; *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases).[11] The Pennsylvania and Tennessee commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect. *See Tennessee Halo Order* at 22 n.85. We agree with the analysis in those orders and finds that the Transcom bankruptcy rulings do not affect any of the issues actually at stake in this case. Even if Transcom were an ESP, and deemed to be an end-user for purposes of access charges, that would only make a difference in this case if Transcom were therefore deemed to originate (and transform to wireless) every call it touches, regardless of where or on what type of network the call began. None of the bankruptcy rulings addresses, much less decides, that origination issue, which means those decisions have no bearing on this case.

[11] The other decision, the one confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in the proceedings leading to that order, nor was it necessary to the order. Accordingly, the order has no preclusive effect. *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

Halo also has argued that Transcom still must be deemed to originate every call it touches even if it is not an ESP. Halo claims that every entity must either be a common carrier or an end-user, that Transcom is not a common carrier and therefore must be an end-user, and therefore that Transcom originates every call it touches. That theory has no merit even if Transcom were deemed to be an end-user. While it is true that end-users *can* originate calls, there is no legal or logical support for the idea that an alleged end-user must be deemed to originate every call it touches – especially when the call was started by someone else and all the alleged "end-user in the middle" does is pass the call along to Halo. Indeed, if Halo's theory were correct it would mean an end to all access charges, since every carrier would simply have all their calls first pass through an alleged "end-user" in the same local area where the call will be terminated, and then claim that by passing through that "end-user" every single call was originated as a local call. That would be absurd.

Finally, even though Halo's theory fails regardless of whether Transcom is an ESP, the fact is that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service." The FCC defines "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a). In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in

deciding whether a service is "enhanced" one must use the end-user's perspective.[12] The FCC typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services." *See AT&T Calling Card Order*, ¶ 16 & n.28.[13]

Transcom claims that it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts "comfort noise" during periods of silence so the parties do not think the call has been disconnected. Tr. 449-50 (Johnson Rebuttal at 17-18). In other words, Transcom does not in any way alter or add to the content of any call. Rather, the parties still say their own words and that is all that gets transmitted. Transcom just tries to make the voice communications more clear. Tr. 497-98 (Johnson). As AT&T's Mr. Neinast explained, suppressing background noise and adding comfort noise are not "enhancements" to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances). Tr. 193-94 (Neinast Direct at 27-28); Tr. 220-22 (Neinast Rebuttal at 17-19).

The FCC's decisions likewise show that Transcom is not providing enhanced service. In the *AT&T Calling Card Order*, for example, legacy AT&T argued that a calling card service was "enhanced" because, during call set-up, the caller heard an advertising message from the retailer that sold the card and was given options to push buttons to do things other than complete the call

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[12] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

[13] Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. Tr. 384-85 (Wiseman Surrebuttal at 7-8). That is both incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end-user is using, regardless of who provides that basic telephone service.

(*e.g.* buy more calling minutes on the calling card), and also because some of the transport of the call was over AT&T's Internet backbone using Internet Protocol ("IP") technology. *AT&T Calling Card Order*, ¶¶ 6, 11-12. The FCC held that this service was not "enhanced" under FCC Rule 64.702. *Id.*, ¶ 16. As the FCC explained:

> Because the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no "offer" to the customer of anything other than telephone service, nor is the customer provided with the "capability" to do anything other than make a telephone call.
>
> . . . We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the card-holder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call . . . .

AT&T Calling Card Order, ¶¶ 15-16 (emphasis added).

We believe that the same analysis applies to Transcom's service, which appears to be even more invisible to the calling party. Transcom's involvement in the calls at issue here occurs "automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]" and Transcom does not provide any service to the calling party. Tr. 442 (Johnson Rebuttal at 10). Nor does the calling party receive from Transcom (or from their own carrier) "anything other than [the capability to] make a telephone call." *Id.*, ¶¶ 16-17.

The FCC also noted that none of the packaging material for the calling card service in the *AT&T Calling Card Order* mentioned the alleged enhancement of using the cards to listen to advertisements, which led the FCC to conclude that no enhancement or special capability was being "offered" to customers. *AT&T Calling Card Order*, ¶ 15. The same is true here, because none of Transcom's written marketing materials makes any mention of the alleged "enhancements" that Transcom provides, so there is no "offering" of any enhancement. Tr. 222

(Neinast Rebuttal at 19). Halo witness Mr. Johnson conceded that the end-user making the call it not "allow[ed] ... the option of choosing enhancement or not enhancement." Tr. 495. We also find it significant that until recently Transcom's website stated that Transcom's "core service offering" is "Voice Termination Service," not any alleged service enhancements (Tr. 65 (McPhee Rebuttal at 4)); that until recently Transcom's website never mentioned any alleged "enhancements" to service quality (*id.* at 66); and that the alleged enhancements are so incidental that they are not even mentioned in Transcom's contracts with its customers. *See* Tr. 183 (Neinast Rebuttal at 17). It is difficult to credit Transcom's claims about offering enhanced services when Transcom itself did not find them worth mentioning in its marketing materials, customer contracts, or website.

The FCC's *IP-in-the-Middle Order* further shows why Transcom's service is not an "enhanced service." In that case, the FCC held that AT&T's IP telephony service was not an enhanced service, finding that it "(1) use[d] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[d] and terminate[d] on the public switched telephone network (PSTN); and (3) under[went] no net protocol conversion and provide[d] no enhanced functionality to end users due to the provider's use of IP technology."[14] As the FCC put it, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service," which mean that the IP-in-the-middle service was no an enhanced service. *IP-in-the-Middle Order*, ¶ 15.

All of those things are also true of Transcom's service. The end-users that make calls do not order a different service (they do not order any service from Transcom (Tr. 442 (Johnson

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[14] *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 1 (2004) ("*IP-in-the-Middle Order*").

Rebuttal at 10[15])); they do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, "[f]rom the customer's perspective" – the perspective of the end-user making the call – anything Transcom does is merely "incidental" to or "adjunct to" the underlying voice service provided by the caller's carrier, does not alter the "fundamental character" of that underlying service, and is therefore not an "enhanced service." *AT&T Calling Card Order*, ¶ 16.[16] *See also* Tr. 513-14 (Rozycki Direct at 8-9) (discussing same order).[17]

Consistent with the FCC precedent, two state commissions have now held that Transcom's service is not an enhanced service. In a Pennsylvania case, a carrier called Global NAPs ("GNAPS") argued that Transcom was as ESP, making all the same claims that Transcom

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[15] Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. Tr. 442 (Johnson Rebuttal at 10). Thus, "Transcom does not deal with ultimate consumers [*i.e.*, end users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end users] at all." *Id.*

[16] Further evidence that Transcom does not alter the "fundamental character" of the calls that pass through it on the way to Halo and AT&T is that the calls still fit easily with the definition of "telecommunications" in 47 U.S.C. § 153(50). The definition states that "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content thereof." The calls at issue here, *e.g.*, a call from a girl in California to a relative in Columbia, involve transmission "between or among points specified by the user" (the girl specifies her landline phone in California and her relative's phone in Columbia), of "information of the user's choosing" (the voice communication with her relative), "without change in the form or content of the information as sent or received," since the words the girl speaks in California are the same words that reach her relative in Columbia.

[17] Halo has suggested that Transcom's service must be an enhanced service under the so-called "contamination" doctrine. Tr. 331 (Wiseman Rebuttal at 24 n.20); Tr. 383 (Wiseman Surrebuttal at 6). That doctrine does not apply here. The "contamination doctrine" is an FCC-created concept that applies to protocol processing services by value-added network service providers ("VANs"). The doctrine provides that when such carriers offer enhanced protocol processing services in conjunction with basic transmission service, the enhanced service component "contaminates" the basic service component and that such services, when combined with basic telephone service provided by the same carrier, "contaminate" the telephone service such that the entire service is treated as an "enhanced" service. *Independent Data Comms. Mfrs. Ass'n, Inc.*, 10 FCC Rcd. 13717, at ¶ 18 (1995); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at n.52 (1986). Thus, in order for that doctrine to apply, the "contaminating" service must itself be an enhanced service under FCC Rule 64.702. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at ¶¶ 43-44 (noting that if some protocol processing services were defined as not being "enhanced" services, the contamination doctrine would no longer apply to the underlying basic service component). As shown in the text, however, Transcom's service is not an enhanced service under FCC Rule 64.702 and FCC precedent, so there is no "contamination" of anything.

and Halo make here. The Pennsylvania PUC disagreed and held that Transcom is not an ESP, stating as follows:

> GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. [citation omitted] Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. . . . .
>
> In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above [the *AT&T Calling Card Order* and the *IP-in-the-Middle Order*], we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges.[18]

Similarly, in the recent ICA complaint case brought by AT&T Tennessee against Halo, the TRA held that Transcom is not an ESP. The TRA found that:

> Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call. . . .The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed "enhancements" in the sense of an ESP.

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[18] *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2010 WL 1259661, at 16-17 (Penn. PUC, Feb. 11, 2010).

Tennessee Halo Order, at 21-22. The Pennsylvania and Tennessee Commissions' analyses apply with equal force here.

For all of the reasons stated, we find that Transcom is not an ESP. At best, whatever Transcom does is merely "incidental" to the underlying telecommunications service provided by the calling party's carrier, and therefore does not qualify as an enhanced service. *AT&T Calling Card Order*, ¶ 16 & n.28.[19]

Finally, we reject Halo's theory that Transcom performs certain purported "enhancements" on the calls it receives from other carriers and then "originates" the allegedly "enhanced" traffic for delivery to Halo. For all of the reasons set forth above, Transcom neither performs enhancements nor originates traffic. Even if that were not the case, however, the allegedly "enhanced" traffic necessarily would "originate" from the same location that Transcom performed the "enhancements," and Halo's own witness testified that these enhancements take place in Atlanta, Georgia.[20] So even if Transcom did originate "enhanced" traffic, it would originate that traffic in Atlanta, Georgia over landline facilities (because the only wireless link in

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[19] We also find that even if Transcom were an ESP, the allegedly "enhanced" traffic necessarily would "originate" from the same location that Transcom performed the "enhancements," and Halo's own witness testified that these enhancements take place in Atlanta, Georgia. Tr. 493-94, 498. So even if Transcom did originate "enhanced" traffic, it would originate that traffic in Atlanta, Georgia over landline facilities (remember, the only wireless link in the entire call flow is the 150-foot wireless transmission that occurs in Orangeburg).

This is significant for two reasons. First, even if Transcom did originate enhanced traffic, such traffic would originate over landline (not wireless) facilities, and the ICA prohibits Halo from delivering landline-originated traffic to AT&T South Carolina. Second, landline-originated traffic (or wireless-originated traffic, for that matter) that originates in Atlanta and terminates in Columbia is non-local traffic to which access charges apply.

[20] On cross-examination by ORS, Halo witness Mr. Johnson explained how Halo and Transcom would handle a call that a Comcast end-user in Greenville placed over a landline device to an AT&T end user in Charleston. Tr. 493-94. Halo's witness testified that Comcast would deliver that call to Transcom in Atlanta, Georgia, and Transcom would then deliver that call to Halo. *Id.* On cross-examination by AT&T, Mr. Johnson testified that the "enhancements" Transcom purports to make to the call take place in Atlanta. Tr. 498. Transcom has three other switching stations in addition to the one in Atlanta (these other data centers are in New York, Los Angeles, and Dallas), Tr. 38 (McPhee Direct at 8), and it is conceivable that what Halo erroneously refers to as "enhancements" could take place at any of these data centers. Regardless of the data center at which the purported "enhancements" occur, however, a transmission that purportedly "originates" from that that data center would not be local to South Carolina.

the entire call flow is the 150-foot wireless transmission that occurs in Orangeburg). This is significant for two reasons. First, even if Transcom did originate enhanced traffic, such traffic would originate over landline (not wireless) facilities, and the ICA prohibits Halo from delivering landline-originated traffic to AT&T. Second, traffic that originates in Atlanta and terminates in Columbia is non-local traffic to which access charges apply.

Based on the foregoing discussion, we find that Halo has materially breached its ICA by sending significant amounts of traffic to AT&T that is not originated on wireless equipment. The evidence also shows that much of this landline-originated traffic was non-local (interstate or interLATA) in nature, that AT&T terminated this traffic for Halo, but that Halo has not paid terminating access charges on such traffic. Because Halo has obtained and AT&T had provided the equivalent of terminating access service, Halo must be held responsible to pay the terminating access charges on that traffic, which are set forth in AT&T's tariffs. We understand that while we declare Halo to be liable for such charges, the actual amount due will be a matter for Halo's ongoing bankruptcy proceeding.

B. CHARGE NUMBER ISSUE

The exchange of accurate call detail information between interconnected carriers is essential. This information includes the phone number of the person that originated the call (the Calling Party Number, or "CPN") and, in some instances, a different number for the person or entity that bears financial responsibility for the call (the Charge Number, or "CN"). Tr. 198-99 (Neinast Direct at 32-33). A Charge Number might be used, for example, when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. *Id.* In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged for the call. *Id.* When the call information includes both a CPN and

a CN, the CN overrides the CPN and controls how the call is categorized and billed. *Id.* at 199. Specifically, the CN is used to determine the jurisdiction and rating for the call – that is, whether the call is local or non-local, and therefore whether it is subject to reciprocal compensation or access charges.

The ICA requires call information like CPN and CN to be accurate so the parties can accurately bill one another. Tr. 52-53 (McPhee Direct at 22-23) & Hearing Ex. 1 (Ex. JSM-4 at § XIV.G). Until the end of 2011, however, Halo inserted a CN assigned to Transcom into the call record on every call it sent to AT&T. Tr. 338 (Wiseman Rebuttal at 31); Tr. 407 (Wiseman); Tr. 200 (Neinast Direct at 34). In every case the CN was local to (*i.e.*, in the same MTA as) the number the call was being terminated to, making the call appear to be local, and thus subject to reciprocal compensation rather than access charges – even when the call was not local. Tr. 200 (Neinast Direct at 34). For example, a call destined to Columbia may begin in California and would therefore have a California CPN, but Halo would insert a CN that is local to Columbia into the call information and thereby make the call appear to be local rather than long-distance. *See* Tr. 200 (Neinast Direct at 34) & Hearing Ex. 4 (Ex. MN-7).

We find that there was no justification for Halo's insertion of a Transcom CN, and that inserting it was a breach of the ICA, because Transcom was not the financially responsible party on any of these calls. A CN is used when one party (say, an employer) takes financial responsibility for calls made by another party (say, its employee). Here, however, it is undisputed that there is no relationship between Transcom and any of the calling parties that made these calls (Tr. 407-08 (ORS's cross-examination of Wiseman)); Tr. 442 (Johnson Rebuttal at 10)), and therefore Transcom is not the financially responsible party on any of these calls,

because Transcom does not pay the phone bills for any of those calling parties. Halo therefore violated the ICA and industry practices for call information.

Halo tries to excuse its conduct with the same argument as on the origination issue, namely that Transcom should be deemed to originate all calls and therefore is financially responsible for them. Tr. 340 (Wiseman Rebuttal at 33). But Transcom does not originate calls, as we found above. Furthermore, the FCC has stated that the CN field "may not contain or be populated with a number associated with an intermediate switch, platform, or gateway," yet that is what Halo did. *Connect America Order*, ¶ 714. In addition, Transcom has no relationship with any of the individuals that actually originate any of these calls, and no reason – or authorization – to have Halo insert a CN to make Transcom financially responsible for these calls originated by strangers through their own separate carriers. Thus, as the TRA recognized, Halo's insertion of a Transcom Charge Number breached the ICA. *Tennessee Halo Order*, at 18.

Halo contends that its breach of the ICA caused no harm to AT&T, but that argument has no merit. Halo first claims there was no harm because the ICA says that AT&T will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis. Wiseman Rebuttal at 32. That theory fails because the ICA allows that factor to be adjusted based on the actual traffic sent by Halo. McPhee Rebuttal at 24 & Hearing Ex. 1 (Ex. JSM-4, § VII.D). As noted above, the industry practice is to determine the local or non-local nature of the traffic based on the CN (when both CPN and CN are present). Inserting an inaccurate CN thus made it more difficult for AT&T to evaluate Halo's traffic (and, indeed, AT&T might never have discovered that the CN was inaccurate if it had not been investigating whether any of Halo's traffic was landline-originated). Tr. 193-94 (Neinast Rebuttal at 27-28).

Halo also asserts there was no harm to AT&T because the call records that Halo sent to AT&T included the CPN as well as the CN, so AT&T still had the data needed to determine the call's actual starting point. Tr. 339 (Wiseman Rebuttal at 32). We disagree. It is true that, *once it discovered* there was a need to investigate Halo's call information and undertook the cost and burden of conducting that investigation, AT&T was able to use the CPN to determine the true nature of the calls coming from Halo. That is why this complaint case exists. The point, however, is that AT&T had to conduct a special investigation to do that, because otherwise the industry practice is to treat CN as overriding the CPN. By inserting the inaccurate CN, then, Halo masked the true nature of the calls it was sending AT&T, in breach of the ICA.

C. INTERCONNECTION FACILITIES CHARGES

As noted earlier, Halo entered into a wireless ICA with AT&T, and wireless ICAs are somewhat different from landline ICAs. Tr. 42 (McPhee Direct at 12). One difference concerns cost responsibility for interconnection facilities. In a landline ICA, cost responsibility is typically determined by the point of interconnection ("POI"), in that the CLEC typically is responsible for the facilities on its side of the POI and the ILEC typically is responsible for the facilities on its side of the POI. *Id.* at 56. Wireless ICAs are different. In a wireless ICA, cost responsibility for interconnection facilities typically is shared between the carriers and typically apportioned based on the amount of traffic sent by each carrier. *Id.* The Halo-AT&T ICA is a typical wireless ICA in this regard. Section V.B of the ICA requires AT&T and Halo to pay each other for interconnection facilities based on the proportion of the total traffic that each party sends to the other, stating as follows:

> [AT&T] and [Halo] will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as

> amended from time to time. [AT&T] will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of [AT&T] originated Local traffic to [Halo]'s POI within [AT&T]'s service territory and within the LATA (calculated based on the number of minutes of traffic identified as [AT&T]'s divided by the total minutes of use on the facility), and [Halo] will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic.

Hearing Ex. 1 (Ex. JSM-4). Section VI.B.2.b, in turn, states:

> [AT&T] will bill [Halo] for the entire cost of the facility. [Halo] will then apply the [AT&T] originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by [AT&T] to [Halo]. [Halo] will invoice [AT&T] on a monthly basis, this proportionate cost for the facilities utilized by [AT&T].

Id. The apportioning of facilities costs applies for the entire facility between AT&T's switch and Halo's switch. Tr. 56 (McPhee Direct at 26).

In order to interconnect with AT&T, Halo has ordered and obtained various interconnection facilities from AT&T. Tr. 55 (McPhee Direct at 25). AT&T has billed Halo for those facilities, but Halo has disputed those charges and refused to pay them. As of the end of 2011, more than $172,000 in charges for these facilities remained disputed and unpaid. *Id.* AT&T is entitled to be paid for what it provided.

Halo's main defense is its theory that cost responsibility for interconnection facilities ends at the POI. Tr. 365-74 (Wiseman Rebuttal at 58-67). That might make sense if Halo had a landline ICA, but it does not. The ICA here uses the typical wireless ICA terms, where cost responsibility for interconnection facilities is based on proportional usage. *See* Tr. 55-56 (McPhee Direct at 25-26). It is undisputed that 100% (or very close to 100%) of the traffic between the parties comes from Halo, meaning Halo is responsible for 100% of the costs for the interconnection facilities that is has ordered from AT&T, obtained from AT&T, and used to send traffic to AT&T. *Id.* at 56. We therefore declare that, under the ICA, Halo must pay for those

facilities. We assume that the amount due will be worked out in bankruptcy court in Halo's bankruptcy proceeding.

Halo's other defense relies on footnote 1 to Section IV.B of the ICA, which states as follows:

> On some occasions [Halo] may choose to purchases facilities from a third party. In all such cases [Halo] agrees to give [AT&T] 45 (forty five) days notice prior to purchase of the facilities, in order to permit [AT&T] the option of providing one-way trunking, if, in its sole discretion [AT&T] believes one-way trunking to be a preferable option to third party provided facilities. Such notice shall be sent pursuant to Section XXIX. In no event shall [AT&T] assess additional interconnection costs or per-port charges to [Halo] or its third-party provider should [Halo] purchase facilities from a third party, e.g. the same charges that [AT&T] would charge [Halo] should it provide the service.

Halo contends that this footnote means that if it obtains any interconnection facilities from a third party, it does not have to pay AT&T for any interconnection facilities, even the ones it admittedly obtains from AT&T. Tr. 391-92 (Wiseman Surrebuttal at 14-15). That position does not make sense and is not consistent with a plain reading of footnote. Footnote 1 makes clear that if Halo obtains interconnection facilities from a third party, AT&T cannot continue to bill Halo for those same facilities. And AT&T has not billed Halo for any of the facilities Halo obtains from third parties. But footnote 1 cannot logically be read to mean that by obtaining interconnection facility A from a third party, Halo is somehow absolved for paying AT&T for interconnection facilities B, C, and D that it obtained from AT&T. Contracts should not be interpreted to reach such an absurd result.

IV. CONCLUSION

As remedies for Halo's breaches of the ICA, and to prevent further harm from continued breaches, the Commission makes the following findings and grants the following relief:

(a) Halo has materially breached the ICA by: (1) sending landline-originated traffic to AT&T, (2) inserting incorrect CN information on calls; and (3) failing to pay for facilities it has ordered pursuant to the ICA.

(b) As a result of these breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo.

(c) Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T (though we do not quantify any precise amount due, assuming that is an issue for Halo's bankruptcy proceeding).

(d) Halo is liable to AT&T for interconnection facilities charges that it has refused to pay to AT&T (though we do not quantify any precise amount due, assuming that is an issue for Halo's bankruptcy proceeding).

IT IS SO ORDERED

BY ORDER OF THE COMMISSION:

_____

John E. Howard, Chairman

ATTEST:

_____

David A Wright, Vice Chairman

(SEAL)

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Proposed Order in Docket No. 2011-304-C to be served upon the following on June 15, 2012:

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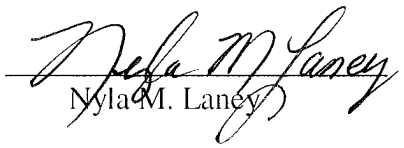

Nyla M. Laney

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